1988

Price River Coal Company and/or Cigna Insurance Company v. Industrial Commission of Utah and Marte T. Mabbutt : Reply Brief

Utah Court of Appeals

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THE COURT OF APPEALS OF THE

STATE OF UTAH

PRICE RIVER COAL COMPANY and/or CIGNA INSURANCE COMPANY, Plaintiffs, -vs- INDUSTRIAL COMMISSION OF UTAH, and MARIE T. MABBUTT, Widow of Fred C. Mabbutt, deceased, Defendants.	Case No. 88-0372-CA Priority Classification: 6

REPLY BRIEF OF DEFENDANT MABBUTT

ON WRIT OF REVIEW FROM THE UTAH COURT OF APPEALS TO

THE INDUSTRIAL COMMISSION OF UTAH

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from final agency action in the form of an order entered by the Industrial Commission of Utah on May 23, 1988. This Court has jurisdiction of this case pursuant to Utah Code Annotated, Section 63-46b-14 (1987).

ISSUES PRESENTED

1. Whether the Industrial Commission complied with Price River Coal Company v. Industrial Commission 731 P.2d 1079 (Utah 1986) when it once again awarded benefits to the respondent, Marie T. Mabbutt.

2. Whether the Industrial Commission committed reversible error in its decision.

3. Whether the Administrative Law Judge demonstrated extreme bias during the hearing.

STATEMENT OF THE CASE

On January 13, 1982, Marie T. Mabbutt, hereinafter referred to as "respondent," filed a claim for dependent's benefits and/or burial benefits with the Industrial Commission of Utah. A hearing was held on May 8, 1984, before Keith E. Sohm, Administrative Law Judge, Industrial Commission of Utah. The matter was then referred to a medical panel on May 23, 1984, by Judge Sohm.

Thereafter, the Administrative Law Judge awarded benefits to the respondent. But on December 31, 1986, the Utah Supreme Court remanded this matter to the Industrial Commission for additional

findings of fact. Price River Coal Co. v. Industrial Commission, 731 P.2d 1079 (Utah 1986). The Supreme Court found that the Commission had to determine the nature of Fred C. Mabbutt's activities in the mine on the day of his death. The Administrative Law Judge made his tentative findings on July 8, 1987, and again referred the matter to the same to the medical panel for further evaluation. The medical panel filed its supplemental report on September 1, 1987. On February 24, 1988, the Administrative Law Judge filed his final Order Upon Remand again awarding benefits to the respondent.

On March 7, 1988, petitioners filed a Motion for Review objecting to the Administrative Law Judge's finding that both legal and medical causation had been established, as required by Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). On March 10, 1988, respondent filed a Cross-Motion for Review arguing that the Administrative Law Judge should have awarded attorneys' fees in addition to benefits awarded as opposed to making them part of respondent's award and that the fee should have been calculated based on a percentage of more than just the first six years of benefits plus any interest awarded. On May 23, 1988, the Industrial Commission denied petitioners' Motion for Review. With respect to respondent's Motion for Cross-Review, the Commission found that the Administrative Law Judge correctly calculated the attorneys fee.

STATEMENT OF THE FACTS

The deceased, Fred C. Mabbutt, was born on November 26, 1919, and was one month short of his 62nd birthday when, on October 23, 1981, he was found dead in the #3 mine of Price River Coal Company located in Helper, Utah at the end of an eight-hour shift as an underground coal mine beltman. At the time of his death, he was married to Marie T. Mabbutt, the respondent. Mr. and Mrs. Mabbutt were married on December 9, 1940.

Mr. Mabbutt weighed over 200 pounds and was approximately six feet tall. He had been treated for diabetes which was diagnosed in 1975, and for high blood pressure which leveled off when he began taking insulin. Mr. Mabbutt had gout for which he took medication. He took Tums and aspirin to work in his lunch bucket for his heartburn. He had surgery for kidney stones, skin cancer near his eye and he had a long history of hypertension. He was neither a smoker nor a coffee drinker. [R. Vol. 2 pg. 32-34, 39]

Mr. Mabbutt had been employed by Price River Coal Company for approximately 6 years as a beltman which required him to keep certain pumps and belts functioning as well as keeping the belts and the areas around them clear of coal dust and other materials that accumulated. [R. Vol. 2 pg. 26]. He worked in an area located near two mine shafts which intersected at right angles where a high conveyor belt, the top being about ten feet high, carried coal and other materials to a point where it intersected a lower conveyor belt which was less than waist high. [R. Vol. 2

pg. 63, 92] About 70 feet along the higher belt line was a reservoir where coal dust slurry accumulated which was pumped onto the higher beltline. [R. Vol. 2 pg. 46-92] At times Mr. Mabbutt had to clear the pump. A slop-over of slurry consisting of a thick black liquid had to either be shoveled with a square-nosed shovel up onto the high belt, or scooped into five gallon buckets which then had to be carried and dumped onto the other conveyor belt. The bucket filled with slurry weighed about 60-70 pounds when full and Mr. Mabbutt carried a bucket in each hand. [R. Vol. 2 pg. 46,47,92-96, 149]

Mr. Mabbutt was also required to scrape materials out from under the beltline with a long-handled shovel, do "muck" and cleanup work, spray the area with a hose, and "rock-dust" the area. [R. Vol. 2 pg. 92-97] The water hose was used to settle the coal dust as a precautionary measure to avoid explosions as was the rock dusting. In addition, the area where Mr. Mabbutt worked was a secondary emergency exit for underground workers in the event of a disaster in the mine, such as an explosion or a fire. [R. Vol. 2 pg. 68-69] Hence, for safety reasons, Mr. Mabbutt's job required him to keep the area clear of debris and maintain it in good condition for escaping miners in the event of an emergency. He also had to keep his work area clear to avoid being cited by the MSHA. [R. Vol. 2 pg. 46,58,68-69]

Mrs. Mabbutt testified that her husband "... was always disgusted because whoever worked the shift before him would not clean up the beltline or do his job properly, and every time Fred

went to work he would have to clean up after the other shift besides his own." [R. Vol. pg 27] Mr. Mabbutt essentially worked his shift alone without supervision and, in fact, it was not unusual for him to work an entire 8-hour shift without seeing a fellow worker.

On Friday October 23, 1981, Mr. Mabbutt left his home at 6:00 o'clock in the morning to pick up Richard K. Westbrook, a fellow coal miner on his way to work that day. [R. Vol. 2 pg 29,55] Mrs. Mabbutt testified that she did not notice anything unusual about her husband when he left for work that morning. [R. Vol. 2 pg. 29] Mr. Westbrook indicated that Mr. Mabbutt appeared normal. In fact, Mr. Mabbutt talked about going hunting with his children. [R. Vol. 2 pg. 54-55]

During his last work day, Mr. Mabbutt commenced work and had been at his station for approximately three hours when Gene M. Miller, a belt inspector, visited his area at approximately 11:15 in the morning. [R. Vol. 2. pg 62, Vol. 1 pg. 134] When Mr. Miller arrived at Mr. Mabbutt's work area, he noticed a build-up of muck. [R. Vol 1 pg. 125-126] Mr. Miller also observed Mr. Mabbutt as he attempted to stuff a one-inch water hose down into a larger hose which was attached to the sump-pump in an effort to unplug the pump. In doing this, water was squirting all over Mr. Mabbutt. [R. Vol. 2 pg. 64, Vol. 1 pg. 132] When asked what he was doing, Mr. Mabbutt swore violently and complained about the plugged-up pump. Mr. Miller perceived Mr. Mabbutt's swearing as very unusual since he had never heard him swear before. [R. Vol.

2 pg. 64-65] Mr. Miller noted that the method being used to unplug the pump was one that he had never observed before. [R. Vol 2 pg. 68] Mr. Miller noticed that Mr. Mabbutt's clothes were extremely wet. [R. Vol. 2 pg. 64,65,70-72,76-77,79] Mr. Miller also testified that he could not hear the pump working at that time, which meant that the area was getting more plugged up as time went on. [R. Vol. 2 pg. 67]

The area of the build-up was approximately ten by twenty feet. [R. Vol. 1 pg. 125,127,130] That area was on a slope, the deepest end being two feet. [R. Vol 1 pg. 125, 129] [2nd Tr. 32, 36] This area was referred to as a "sump area." [R. Vol 1 p 129-130] The pump which was normally used to pump the muck from this area was plugged at the time when Mr. Miller arrived in the area on October 23, 1981. [R. Vol. 1 pg. 130,132] Mr. Miller also observed slurry going over the dam. [R. Vol. 2 pg. 67] [1st Tr. 48] Mr. Miller further observed Mr. Mabbutt attempting to move the 110 pound pump out of the muck. Mr. Mabbutt was straining to pull on the hose attached to the pump and appeared extremely agitated and angry to Mr. Miller. [R. Vol. 2 pg. 65,70-72,78]

With the pump plugged, the only way to clear the sump area was to fill five gallon buckets and carry the muck out of the sump area. [R. Vol. 1 pg. 130] Mr. Miller testified that he observed Mr. Mabbutt fill a "couple buckets" and carry the filled buckets out of the area. [R. Vol. 1 pg. 126] Mr. Miller stated that while he was at lunch he saw Mr. Mabbutt make "several

trips" carrying two buckets at a time. [R. Vol. 1 pg. 126] These filled buckets weighed about 50 to 60 pounds each. Mr. Mabbutt had to walk sixty to seventy feet up a six to eight percent incline to the second belt to empty the buckets. [R. Vol. 1 pg. 100-101] [2nd Tr. 7-8] The ground was not flat or level. Mr. Mabbutt had to walk where the coal had "been mined out." [R. Vol 1 pg. 101] Mr. Miller testified that it required the filling and carrying of at least one hundred buckets to clear the area where Mr. Mabbutt was working of all the muck. [R. Vol. 1 pg. 134]

Although Mr. Miller asked Mr. Mabbutt to eat lunch with him at that time, Mr. Mabbutt replied that he had to get the pump unclogged, and declined. [R. Vol 2 pg. 69-70] In fact, Mr. Miller testified that he asked Mr. Mabbutt three times to sit down and eat his lunch, but Mr. Mabbutt refused to do so and continued trying to unplug the clogged sump pump. [R. vol 2 pg. 72] Mr. Miller stated that at one point Mr. Mabbutt became so upset that he threw his gloves on the ground. [R. Vol. 2 pg. 70,73] Mr. Miller also testified that Mr. Mabbutt's hands and face appeared a bit pale at that time [R. Vol. 2 pg. 73], and that it could not have been due to rock dusting, since it was too early in the shift for Mr. Mabbutt to be utilizing the rock duster. [R. Vol 2 pg. 82]

At the conclusion of Mr. Mabbutt's shift, and at the request of Mr. Westbrook who was supposed to ride home from work with Mr. Mabbutt on that day, a search was made for Mr. Mabbutt who had not come out of the mine on time. [R. Vol. 2 pg. 76] His

replacement on the following shift, Evelyn L. Hicks, reached the area at approximately 4:20 p.m. and noticed that the area had not been rock-dusted. She heard the pump operating and water running onto the higher belt [R. Vol. 2. pg. 97] [1st Tr. 78]. When she saw Mr. Mabbutt's coat and lunch bucket, she began looking for him. Ms. Hicks found Mr. Mabbutt laying flat on his back with his head near the sidewall of the shaft. [R. Vol. 2 pg. 98-99] One of Mr. Mabbut's eyes was open and the other was closed. Mr. Mabbutt was holding the small water hose, which was still running, in his left hand and water was spurting across Mr. Mabbutt's body. Nearby was one empty, but wet, muck bucket and a No. 2 shovel. The area around the sump pump was clear and no build-up of muck was evident. [R. Vol 2 pg. 100-101]

At the July 7, 1987 hearing, Mr. Miller testified that the water and coal fines had built up and were spilling over the dam when he came over the overcast. [R. Vol. 1 pg. 124-125]

Mr. Miller further testified that the area in which there was a build up of material was approximately ten by twenty feet. The build up of material was approximately two inches to two feet deep. [R. Vol. 1 pg. 125]

Mr. Miller also testified that he observed Mr. Mabbutt making "several trips" carrying two buckets weighing sixty to seventy pounds each. [R. Vol. 1 pg. 126]. Finally, Mr. Miller testified that it would require at least one hundred buckets to clear the size of spill he observed. [R. Vol 1 pg. 134].

SUMMARY OF THE ARGUMENT

Mr. Mabbutt died of a heart attack he suffered while working as a beltman in the appellant's mine. As a beltman, his duties required him to keep his work area clean and to make sure that the conveyor belts were functioning.

But, on October 23, 1981, Mr. Mabbutt was confronted with more. On that day, the pump which is utilized to keep the work area clean was not working. As a result, the "slurry" and "muck" material was rapidly accumulating in Mr. Mabbutt's work area. There was a spill of this material which covered a ten by twenty foot area and was two inches to two feet deep. Mr. Mabbutt attempted to unplug the pump by stuffing a smaller water hose into the pump line. He also attempted to pull the pump out of the "muck." Mr. Mabbutt was seen making several trips carrying two buckets filled with "muck" and which weighed 60 to 70 pounds, up a 7% incline to dump the "muck", which was accumulating in his work area and which was spilling over a dam, onto a second belt. Given the size of the "muck" spill, the uncontradicted testimony was that it would require at least 100 buckets to clean the spill. This meant that Mr. Mabbutt would be required to make fifty trips of approximately sixty to seventy feet while carrying two heavy buckets.

Mr. Mabbutt was very frustrated over the accumulation and over the plugged pump. Mr. Mabbutt was also under pressure to clean his work area. Not only because it was his job, but because this area also served as a secondary escape way for the

miners in the event an emergency occurred in the mine. And, a build up of this material could result in citations from MSHA.

All of the facts support the Industrial Commission's conclusion that Mr. Mabbutt's employment activity on October 23, 1981 involved some unusual or extraordinary exertion over his non-employment life.

The sum and substance of the medical testimony presented to the Industrial Commission was that the unusual and extraordinary exertion which Mr. Mabbutt experienced on October 23, 1981, substantially contributed to and was a precipitating factor resulting in Mr. Mabbutt's fatal heart attack.

Appellants have failed to present any evidence which contradicts the evidence presented by respondent with respect to the work activities performed by Mr. Mabbutt on October 23, 1981. Appellants have also failed to present any medical evidence to contradict the findings of the medical panel or respondent's medical expert.

The Utah Supreme Court remanded this matter to the Industrial Commission for a specific purpose. The Industrial Commission has now satisfied the requirements of the Utah Supreme Court and has again awarded respondent the benefits to which she is entitled. This Court has no choice but to affirm the final administrative decision of the Industrial Commission.

ARGUMENT

I

THE INDUSTRIAL COMMISSION PROPERLY FOLLOWED THE MANDATE OF THE UTAH SUPREME COURT

1. Legal Cause.

The Industrial Commission properly followed the direction given by the Utah Supreme Court in Price River Coal Company v. Industrial Commission, 731 P.2d 1079 (Utah 1986), after applying the Allen v. Industrial Commission, 729 P.2d. 15 (1986) analysis to the initial findings and conclusions entered by the Industrial Commission in this matter. The Utah Supreme Court remanded this case to the Industrial Commission "so that proper findings of fact [could] be entered and the Allen standard [could] be applied to them to determine legal cause" Allen v. Industrial Commission, at 1083. [R. Vol. 1 pg. 59-62]

Since Mr. Mabbutt suffered from a pre-existing condition, the Industrial Commission must find that his "employment activity involved some unusual or extraordinary exertion over and above the usual wear and tear and exertion on non-employment life." Price River Coal Company v. Industrial Commission at 1082. [R. Vol. 1. pg. 61] If this finding is made, then the "legal cause" requirement has been satisfied. Id.

In his Order Upon Remand the Administrative Law Judge made just such a finding. [R. Vol. 1 pg. 372-379] The Administrative Law Judge concluded that Mr. Mabbutt was a coal miner who was

confronted with a plugged sump pump. [R. Vol. 1 pg. 376] As a result of this, coal fines and muck spilled over a dam creating a large puddle which was two inches to two feet deep and covered a ten by twenty feet area. [R. Vol 1 pg. 124-125, 376] The Administrative Law Judge heard testimony that Mr. Mabbutt was pulling on the pump and that he was attempting to unplug the pump by utilizing a water hose. [R. Vol. 1 pg. 132, Vol. 2 pg. 68] In addition, Mr. Mabbutt knew he was working in an area which, in the event of an emergency, would be used by the miners as a secondary escape way. [R. Vol 1. pg. 103].

The Administrative Law Judge heard further testimony that Mr. Mabbutt filled five gallon buckets with "muck" and carried two such buckets to the next belt. Mr. Mabbutt had to carry the buckets up a steep 7% slope for approximately seventy feet. Each bucket weighed approximately sixty-five pounds when filled with muck. [R. Vol. 1 pg. 100-101]

The uncontracticted testimony was that it would have taken at least one hundred buckets filled with muck to clean out the area in which Mr. Mabbutt was working. [R. Vol. 1 p 134]

Based upon the uncontradicted facts, the Industrial Commission concluded that Mr. Mabbutt's "employment contributed something substantial to increase the risk he already faced in everyday life because of his condition." Allen v. Industrial Commission, at 25. [R. Vol 1. pg. 372-379] Hence, the legal cause requirement adopted by the Utah Supreme Court in Allen has clearly been satisfied by the respondent.

2. Medical Cause.

The Utah Supreme Court also required the respondent to establish medical cause. Allen v. Industrial Commission at 27. Under the medical cause test, the respondent "must show by evidence, opinion, or otherwise that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability." Id.

Applying this portion of the Allen requirements to this case, it once again becomes clear that the medical cause requirement has also been satisfied. Appellants' expert, Dr. Fowles, agreed that Mr. Mabbutt's work activities, on the day of his death, probably contributed substantially to increase Mr. Mabbutt's risk of having a fatal heart attack. [R. Vol. 1 pg. 320-322,365,367,368]

The medical panel found that Mr. Mabbutt's work activities on October 23, 1981, led to his death. [R. Vol. 3 pg. 389-390] All the medical evidence presented to the Industrial Commission supports the conclusion that Mr. Mabbutt's work activities on October 23, 1981, were a sufficient precipitating factor resulting in his death by heart attack. [R. Vol. 3 pg. 389-390, Vol. 1 pg. 300,305]

The medical; cause requirement adopted by the Utah Supreme Court in Allen has also been clearly satisfied by the respondent.

II

THIS COURT MUST UPHOLD THE FINDINGS AND ORDER OF THE INDUSTRIAL COMMISSION UNLESS THEY ARE ARBITRARY AND CAPRICIOUS

This Court recently reaffirmed that it "will not disturb the findings and order of the Industrial Commission unless they are arbitrary and capricious, and they are arbitrary and capricious when they are contrary to the evidence or without any reasonable basis in the evidence." American Roofing Company v. Industrial Commission, 752 P.2d 912, 914 (Utah App. 1988) citing Rushton v. Gelco Express, 732 P.2d 109, 111 (Utah 1986).

Respondent has set forth herein all facts which support the Industrial Commission's findings and order. Based thereon, this Court must affirm the Industrial Commission's final Order. The mere fact that appellants are not satisfied with the findings and order does not render them arbitrary and capricious.

III

THE INDUSTRIAL COMMISSION'S DECISION IS NOT BASED UPON IMPROPER FINDINGS OF FACT

In their brief appellants cry foul because the Industrial Commission allegedly made some findings which are not supported by evidence. Appellants cite the following findings in their brief.

1. The Administrative Law Judge found that Mr. Mabbutt tried to lift and pull the 110 pound pump out of the sump, "but with no success." [R. Vol. 1 pg. 375]

The only testimony on this finding was given by Mr. Miller who stated that he was watching Mr. Mabbutt pull on the pump but that he [Mr. Miller] could not actually see the pump. [R. Vol. 2 pg. 71]

There is no evidence that the pump was ever pulled out of the muck prior to the area being cleaned by Mr. Mabbutt.

2. The Administrative Law Judge found that Mr. Miller "observed that the coal fine and muck had spilled over the block dam. . ." [R. Vol. 1 pg. 375]

Mr. Miller testified he observed "coal fines and water and so forth" spill over the dam. [R. Vol. 1 pg. 124-125]

3. The Administrative Law Judge found that Mr. Mabbutt made four trips from the sump area to the No. 4 belt. [R. Vol. 1 pg. 375]

Mr. Miller testified that he could not state exactly how many trips Mr. Mabbutt made. Mr. Miller did however state he observed Mr. Mabbutt make "several trips two buckets each time, say he made four trips." [R. Vol. 1 pg. 126]

4. The Administrative Law Judge found that Mr. Mabbutt was not shoveling coal fine from beneath the rollers [R. Vol. 1 pg. 375]

There is no evidence that Mr. Mabbutt was doing any shoveling except to fill his fine buckets with muck. Appellants' citation to O'Green's testimony [See Appellants' Brief pg. 10] is an unconscionable attempt to distort the truth. O'Green's testimony was based upon observations he made after Mr. Mabbutt's

body had been found, at which time the pump was working and after Mr. Mabbutt had cleared the "muck spill" by using his back, his legs, his arms, his shovel and his buckets.

5. The Administrative Law Judge found that Mr. Mabbutt was shoveling and carrying buckets until his death. [R. Vol. 1 pg 375]

When Mr. Mabbutt's body was found, he was holding a water hose, which was still running, and a shovel and wet muck bucket were found close by. [R. Vol. 2 pg. 100-101] This type of physical evidence lends itself to the logical and reasonable conclusion that Mr. Mabbutt was indeed using the muck bucket and shovel until his demise. The fact that the area had not been "rock dusted" [R. Vol. 2 pg. 97] could lead a person to the reasonable conclusion that Mr. Mabbutt was still carrying the heavy buckets and was also attempting to unplug the pump, which was what he had been doing when Mr. Miller observed him during the lunch hour.

6. The Administrative Law Judge found that Mr. Mabbutt was under pressure to keep the area clean. [R. Vol. 1 pg 376]

Mr. Mabbutt was under extreme pressure. It was his job as a beltman to keep the area clean. The area was a secondary escape way, and if the area was not kept clean, there was a potential MSHA violation.

In view of this and the fact that the pump was not working and that the water and coal fines were spilling over the dam, it is hard to accept appellants' argument that Mr. Mabbutt felt no pressure.

7. The Administrative Law Judge found that Mr. Mabbott's "work activities on October 23, 1981, involved [unusual exertion]" and that these activities "contributed something substantial to increase the risk which he already faced in every day life because of his condition." [R. Vol. 1 pg. 376

The record is littered with facts that support the Administrative Law Judge's conclusion. Mr. Mabbutt was agitated [R. Vol. 2 pg. 65] the pump was not working [R. Vol. 2 pg. 68] the water and coal fines were spilling over the dam [R. Vol. 1 pg. 124-125] he attempted to pull the pump out of the mud [R. Vol. 2 pg. 71], he carried five gallon buckets filled with muck, which weighed approximately 65 pounds, up a 7% incline for a distance of 60-70 feet [R. Vol. 1 pg. 100-101,126] and he was under the stress of attempting to keep his work area, which was also a secondary escape way, clear [R. Vol. 1 pg. 103].

Appellants' charge that findings of unusual exertion is based upon speculation and the further charge that the Administrative Law Judge inferences are not reasonable. [Appellants' brief p 13-14] The one witness upon who appellants rely throughout is O'Green. O'Green's testimony is based entirely upon speculation and assumption. O'Green did not work with, talk to or even see Mr. Mabbutt on October 23, 1981. O'Green did not inspect Mr. Mabbutt's work area until after Mr. Mabbutt's body had been taken out of the mine. [R. Vol. 1 pg. 161] O'Green's testimony is just not credible. Mr. Miller testified that the water and coal fine were spilling over the

dam. [R. Vol. 1 pg. 124-125] Mr. Miller was there, he observed Mr. Mabbutt, and he observed the problems confronting Mr. Mabbutt. O'Green's testimony that the material in the area was not nearly to a point of overflow [R. Vol. 3. pg 517] is not credible because that testimony is based upon O'Green's observation after Mr. Mabbutt had already cleaned the area. [R. Vol. 1 pg. 161] By citing O'Green's testimony to support the argument that the Administrative Law Judge's conclusion is just not reasonable, counsel for appellants is distorting the record and is a blatant attempt to manufacture conflict where there is none.

The appellants cannot cite any evidence to contradict that Mr. Mabbutt did make several trips carrying heavy muck buckets to clean his work area. Appellants cannot cite any evidence that Mr. Mabbutt actually managed to unplug the pump by using the water hose. It is counsel for the appellants who is making unreasonable inference by building his case on the suspect testimony O'Green and Dr. Bloswick. The assumptions made and conclusions reached by Dr. Bloswick were based, to a great extent, on information he obtained from O'Green and appellants' counsel, not upon his review of the record. [R Vol. 1 pg. 202-206]

The appellants also suggest that the Administrative Law Judge should have made certain findings. [Appellants' Brief pg 16-20] There is no question that Mr. Mabbutt was suffering from a pre-existing condition. Price River Coal Company v. Industrial Commission, at 1082.

There is also no question that the medical evidence presented by the three cardiologists supports the Administrative Law Judge's finding of medical causation. [R. Vol. 1 pg. 377] Dr. Perry concluded that "I still feel that the patient's work activities were a material contributing factor to [Mr. Mabbutt's] death from coronary artery disease." [R. Vol 1 pg. 305] Mr. Mabbutt's work provided the impetus of exertion which contributed to his sudden death on October 23, 1983." [R. Vol. 1 pg. 300] Even appellants' expert essentially agreed with the opinion rendered by respondent's expert, Dr. Yanowitz. [R. Vol. 3 pg. 541]

IV

THE ADMINISTRATIVE LAW JUDGE DID NOT DEMONSTRATE ANY BIAS DURING THE HEARING

The record does not support appellants' allegation that the Administrative Law Judge demonstrated any bias. Appellants cite this court to a statement made by the Administrative Law Judge during the hearing. Appellants' charge that the Administrative Law Judge "interrupted and in a lengthy and argumentative manner" [Appellants' Brief pg 21] said "I find that hard to believe." [R. Vol. 1 pg. 196]

A review of the discussion preceeding that statement indicates that the Administrative Law Judge did not interrupt. The Administrative Law Judge was attempting to clarify which exhibit appellants' counsel was referring to during his examination of the witness. [R. Vol 1 pg 194-196]

It was following the Administrative Law Judge's summary of his understanding of the witness' testimony, and the witness basically agreed with that summary, that the now questioned statement was made. [R. Vol 1 pg. 102] This statement should have alerted appellants' counsel that the Administrative Law Judge was having some concern over the witness' testimony and counsel should have clarified the testimony. The Administrative Law Judge was sending up a "red flag" which counsel obviously ignored.

As set forth herein, O'Green's testimony is not relevant to the issues raised in this case. O'Green had no contact with Mr. Mabbutt on October 23, 1981. O'Green did not ever inspect Mr. Mabbutt's work area until after Mr. Mabbutt's body had been removed from the mine. O'Green, quit simply did not offer any testimony which is useful in resolving the issues which the Utah Supreme Court wanted resolved when it remanded this matter.

With respect to Dr. Bloswick's testimony, it has been established that his assumption and conclusions were based, to a great degree, upon information received from appellants' counsel, O'Green and not from the record. [R. Vol. 1 pg. 202-206]

V

THE ADMINISTRATIVE LAW JUDGE DID COMPLY WITH UTAH CODE ANNOTATED, SECTION 63-43B-10(1)(a)

Utah Code Annotated, Section 63-43b-10(1)(a) (Supp. 1988) requires the Administrative Law Judge to include in his order a statement of his findings of fact based exclusively on the

evidence of record. The findings made by the Administrative Law Judge in this case are supported by the evidence. The inference drawn in this case, although not acceptable to appellants' counsel, are all reasonable and are supported by the uncontradicted evidence. Therefore, the Administrative Law Judge did comply with the mandate of Section 63-43b-10(1)(a).

CONCLUSION

This case involves a claim for benefits under the Utah Workers Compensation Act, a remedial act. If there is any doubt, it must be resolved in favor of the respondent.

Based upon the opinion of the Utah Supreme Court in Price River Coal Co. v. Industrial Commission and upon the testimony and evidence presented to the Industrial Commission, it is respectfully requested this court affirm the May 23, 1988, order of the Industrial Commission. The respondent has satisfied all of the requirements imposed upon her by statute and by the Utah Supreme Court, and is therefore entitled to the benefits awarded by the Industrial Commission.

DATED this 21st day of October, 1988.

DABNEY & DABNEY, P.C.

VIRGINIUS DABNEY, ESQ.
Attorneys for Marie T. Mabbutt

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) true and correct copies, postage pre-paid, of the foregoing document on this the 28th day of October, 1988, to the following:

David L. Wilkinson, Esq.
ATTORNEY GENERAL OF THE STATE OF UTAH
Attorneys for Industrial Commission/
Second Injury Fund
236 State Capitol Building
Salt Lake City, Utah 84114

James M. Elegante, Esq.
PARSONS, BEHLE & LATIMER
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Salt Lake City, Utah 84111

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VIRGINIUS DABNEY, ESQ.
Attorneys for Plaintiff

ADDENDUM

Administrative Law Judge Order (December 20, 1988).

Utah Industrial Commission Order (January 25, 1985).

Supreme Court Decision (December 31, 1986).

Administrative Law Judge Order Upon Remand (February 24, 1988).

Utah Industrial Commission Order Denying Motion for Review (May 23, 1988).

Case No. 82001604

(1)

ARIE T. MABBUTT, widow of, RED MABBUTT, deceased,	*	
Applicant,	*	FINDINGS OF FACT
vs.	*	CONCLUSIONS OF LAW
RICE RIVER COAL COMPANY and/or INA,	*	AND ORDER
Defendants.	*	

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on June 30, 1983 at 1:00 p.m. o'clock. Said hearing was pursuant to Order and Notice of the Commission.

HEARING ON OBJECTIONS: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah on October 24, 1984 at 8:30 a.m. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Keith Sohm, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Virginius Dabney, Attorney at Law.

The defendants were represented by Robert J. Shaughnessy, Attorney at Law, at the first hearing and by James M. Elegante and Erie V. Boorman at the Hearing on Objections.

FINDINGS OF FACT:

The 61 year old Fred C. Mabbutt was employed on the 8:00 a.m. to 4:00 p.m. shift in the underground mine of Price River Coal as a beltman which required him to keep certain pumps and belts functioning as well as keeping the area clear of coal dust and other materials that may slop over or accumulate in his area where two belt lines intersect at right angles. The applicant was found dead October 23, 1981 at 4:20 p.m. at the job site with the cause being identified as a coronary insufficiency from an arterial sclerotic cardiovascular disease. In order to recover workmen's compensation benefits it must be shown that he died of an accident on the job. The term accident has been expanded to include situations involving unusual exertion or unusual stress.

Prior to the incident on Wednesday, October 21, 1981, the applicant ate some tacos and spent a restless night was sick and vomited about 1:00 o'clock a.m. the next morning. Applicant's wife urged him not go to work on on Thursday which he did not do, but returned to work as usual looking quite normal on Friday morning, October 23. The applicant usually carried Tums and Aspirin in his lunch pail. He weighed over 200 pounds and was about six foot tall. He had been treated for high blood pressure back in 1975, which leveled off when he began taking medication for that purpose and for sugar diabetes which also was discovered in 1975, for which he took one shot of insulin a day and watched his diet. He also had gout for which he took medication. He had two operations for kidney stones. He was not a smoker nor coffee drinker.

The applicant worked in an area where two mine shafts intersected at right angles where a high conveyor belt, the top being about nine feet high, carried products to a point where it intersected a lower conveyor belt which was less than waist high. About 70 to 75 feet along the higher belt line was a reservoir where coal dust slurry accumulated which was pumped into the higher belt line. On occasions, the applicant had to clear the pump by sticking a one inch nozzle into the hose connected to the pump to flush it out. A slop over of slurry consisting of a thick black liquid had to be shoveled with a square-nosed shovel up to the high belt or scooped into a five gallon bucket which was carried 70 to 75 feet down to the lower belt and dumped into that conveyor belt. The bucket filled with slurry weighed about 65 pounds and on occasions the applicant would carry a bucket in each hand.

At about 11:00 a.m. a fellow employee saw the applicant and noted he was quite agitated because he was trying to stick the one inch hose of running water into the larger hose of the pump and water was splattering getting him wet from the spray. When asked how he was doing Mr. Mabbutt cussed quite violently. The fellow employee indicated that he could not hear the pump working at that time. He invited Mr. Mabbutt to sit down with him and have lunch, but Mr. Mabbutt declined. He also observed Mr. Mabbutt pulling on a hose to loosen the pump up out of the muck. In addition to shoveling coal dust and muck and doing cleanup work, the applicant was also responsible to spray rock dust in the area at the end of the shift to settle the coal dust.

A lady beltman responsible to do the same work as Mr. Mabbutt came in on her shift following Mabbutt's shift. She arrived at about 4:20 p.m., October 23, 1981 and noticed the area had not been rock dusted. She heard the pump operating and water running into the higher belt. When she saw Mr. Mabbutt's coat and lunch bucket, she began looking for him and found him laying flat on his back with his head near the sidewall of the shaft. One eye was open and one eye was closed. He had the running hose in his left hand which was still spurting across his body to the right toward the sump reservoir. There was one empty bucket and a shovel nearby. The beltlady indicated that they work a total of 7 1/2 hours out of which 1/2 hour goes to lunch and that the beltman spends about 5 hours shoveling and six hours on other duties, which, of course, was not consistent.

The medical aspects of the case were referred to a medical panel for valuation. The medical panel returned its report a copy of which was irculated to the parties. The defendants objected to the medical panel eport. A Hearing was held on the objections. The medical witnesses estifying at the Hearing on Objections were Dr. Frank G. Yanowitz, a ardiologist who had previously testified on behalf of the applicant and Dr. Joseph Perry, the sole member of the medical panel who was called in support of his medical panel report favoring the applicant. The defendants called Dr. Robert E. Fowles a cardiologist in support of its position that the death of Mr. Mabbutt was not industrially related. All three doctors agreed that Mr. Mabbutt was a high risk candidate for a sudden cardiac death or for a continued myocardial infarction and that it could have happened at any time. Some of the factors which caused him to be a high risk in addition to his heart condition were his age, hypertension, diabetes, hypercholesterolemia and gout. The doctors agreed that a person with these problems may more frequently experience a sudden death when involved in physical exertion or possibly with emotional stress.

Dr. Yanowitz appeared at the first hearing and after hearing the testimony concerning the type of work activities Mr. Mabbutt was engaged in acknowledged that the work would put a strain on the cardiovascular system. The doctor further acknowledged that if Mr. Mabbutt was in an agitated emotional state, that could cause an even further hemodynamic demand on the heart muscles. Emotional strain or pressure could aggravate and further increase the myocardial oxygen demands. Dr. Yanowitz felt there was a causal relationship between the activities that Mr. Mabbutt performed and the stresses that he was under on the date of his death and his eventual demise. The doctor further indicated that after hearing final testimony on the last day of hearing including the testimony of Dr. Fowles that it did not change his opinion. Dr. Yanowitz's opinion, of course, agreed with that of the medical panel. Dr. Fowles disagreed only to the extent of saying that he did not have any evidence which would support, in his mind, that Mr. Mabbutt engaged in strenuous activities or was under a stress during the period immediately before his demise. Dr. Yanowitz did not feel the four hour period between the time he was last seen by his fellow worker and the time of his demise was especially significant.

The findings of the medical panel were received in evidence and the Administrative Law Judge adopts the findings of the medical panel as his own which are as follows:

> Were the stresses at work or work activities performed by Mr. Mabbutt a material factor contributing to his death?
>
> I feel the activities of the day of his death probably contributed to his death. I gather the day was unusually stressful psychologically and was demanding physically. Mr. Mabbutt's work seemed to involve a lot of exertion using his upper body which usually, or more easily provokes myocardial ischemia. In addition he appears to have died shortly after a

meal. A meal combined with activity seems to worsen myocardial ischemia. His emotional charged state probably contributed to his death, however, that may or may not have been attributable to his employment.

Did the employment of Mr. Mabbutt merely provide the occasion or was it the cause of his death?

This is a very difficult question best answered by the word yes. However, for the purpose of this opinion, I would have to say it contributed to his death but was not the cause thereof per se.

Would Mr. Mabbutt have died of this condition regardless of the work, or might the death have occurred at home or during any other type of activity just as readily as it did at work?

My opinion is that his death might have occurred at any time at home or any other place. However, his work provided enough in terms of physical and emotional stress that his final event occurred while employed. Mr. Mabbutt had coronary artery disease which was probably without symptoms, a common problem among diabetics. Whether his stomach distress the day before his demise or his diaphoresis the day of his demise were symptoms related to his coronary artery disease are purely conjectural at this point.

Unfortunately the first symptom which Mr. Mabbutt experienced was sudden death which is not uncommon occurring in approximately 25% of individuals with coronary artery disease. The stress of being behind, of needing to catch up, of eating a meal, then or working physically vigorously would have been stressful for a healthy man but far too severe a stress for a man with advanced coronary artery disease. Thus, these factors provided an excellent milieu for the appearance of his initial symptom, death. Thus, I feel that his employment provided a significant contribution to his death but was not the cause thereof, per se.

Dr. Fowles acknowledged that the medical panel's opinion would be considered in the medical community as a reasoned medical opinion. The defendants in a 41 page very scholarly memorandum in opposition to grant of award, emphasized that there is no evidence to show that the applicant was engaged in unusual exertion or undergoing exceptional emotional stress immediately before his death. Of course the body was found about 4:20. Dr. Yanowitz was not concerned about that short few hours from the time the fellow employee testified concerning the applicant's agitated and stressful activities of attempting to unplug the pump earlier. Furthermore there is no way of knowing exactly how long before the hour of 4:20 p.m. the applicant

first felt the effects of that stress or at what time he actually died but it could have been some hours before 4:20 p.m. We are not called upon to speculate as to those times or as to the excessive stress or exertion later in the afternoon in view of the fact that two fine cardiologists have agreed that the evidence is sufficient to convince them that the death was industrially related.

The Administrative Law Judge finds that Mr. Mabbutt died as the result of an accident in the course of his employment on October 23, 1981 resulting from unusual exertion and stress connected with his employment on that fateful afternoon. The applicant is entitled to the maximum benefits in effect at the time of $218.00 per week for six years for a total of $68,016.00 with an additional $1,000.00 burial benefit. The applicant is entitled to $35,752.00 in a lump sum to bring payments current with weekly benefits due after December 21, 1984, at the rate of $218.00 per week until the balance is paid in full. Attorney's fees, based on the formula provided by the Commission, would be $9,800.00. There were no dependent children of the applicant and the deceased at the time of the death.

CONCLUSIONS OF LAW:

The defendants should pay the applicant the sums set forth above.

ORDER:

IT IS HEREBY ORDERED that the defendants pay the applicant the current due amount of $35,752.00 in a lump sum and $218.00 per week beginning December 21 and every week thereafter until the total of $68,016.00 has been made less attorney's fees. The defendants shall pay the additional sum of $1,000.00 for burial allowance.

IT IS FURTHER ORDERED that defendants pay out of the award the sum of $9,800.00 to applicant's attorney, Virginius Dabney.

IT IS FURTHER ORDERED that the applicant report immediately to the Industrial Commission and to the defendant any change of address or change of marital status.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof

specifying in detail the particular errors and objections and unless so filed this Order shall be final and not subject to review or appeal.

Keith E. Sohm
Administrative Law Judge

Passed by the Industrial Commission of Utah
Salt Lake City, Utah, this December 20, 1984
ATTEST:

/s/ Linda J. Strasburg
Linda J. Strasburg, Commission Secretary

I certify that on December 20, 1984 a copy of the attached ORDER was mailed to the following persons at the following addresses, postage paid:

Marie Mabbutt
260 West 500 South
Price, Ut. 84501

Virginius Dabney
Attorney at Law
Suite 412, Kearns Bldg.
Salt Lake City, Ut. 84111

IMA
P.O. Box 390
Salt Lake City, Ut. 84110

Robert J. Shaughnessy
Attorney at Law
543 East 500 South #3
Salt Lake City, Ut. 84102

James M. Elegante
Attorney at Law
P. O. Box 11898
Salt Lake City, UT 84147-0898

Price River Coal Company
Helper, UT 84526

THE INDUSTRIAL COMMISSION OF UTAH

By Sherry Ly

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 82001604

MARIE T. MABBUTT, Widow of FRED C. MABBUTT, Deceased,	*	
Applicant,	*	DENIAL OF
vs.	*	MOTION FOR REVIEW
PRICE RIVER COAL COMPANY and/or INA,	*	
Defendants.	*	

On or about December 20, 1984, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about January 7, 1985, the Commission received a Motion for Review from the Defendants by and through their attorney.

Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. In affirming, the Commission adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of December 20, 1984, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 25th day of January, 1985.

ATTEST:

Linda J. Strasburg
Commission Secretary

Walter T. Axelgard
Chairman

Stephen M. Hadley
Commissioner

Lenice L. Nielsen
Commissioner

CERTIFICATE OF MAILING

I certify that on January 25th, 1985, a copy of the attached Denial of Motion for Review was mailed to the following persons at the following addresses, postage paid:

Marie Mabbutt, 260 West 500 South, Price, UT 84501

Virginius Dabney, Atty., 136 South Main, #412, SLC, UT 84101

INA, P. O. Box 390, SLC, UT 84110

Robert J. Shaughnessy, Atty., 543 East 500 South, #3, SLC, UT 84102

James M. Elegante, Atty., & Erie V./ Boorman, Atty., P. O. Box 11898, SLC, UT 84147-0898

THE INDUSTRIAL COMMISSION OF UTAH

by Wilma

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Price River Coal Co. and Insurance Co. of North America, Employer-Carrier, Plaintiffs,

v.

The Industrial Commission of Utah and Marie T. Mabbutt, widow of Fred C. Mabbutt, deceased, Defendants,

No. 20473

F I L E D
December 31, 1986

Geoffrey J. Butler, Clerk

ZIMMERMAN, Justice:

On December 20, 1984, the Industrial Commission through its administrative law judge, issued findings of fact, conclusions of law and order allowing death benefits for applicant Marie J. Mabbutt, the widow of Fred C. Mabbutt, who died of a heart attack while working as a miner for plaintiff Price River Coal Co. ("PRC"). Mrs. Mabbutt's claim for compensation was based upon the Workers' Compensation Act, U.C.A., 1953, § 35-1-45 (1974 ed., Supp. 1986), which allows compensation to "the dependents of every such employee who is killed, by accident arising out of or in the course of his employment." PRC's Motion for Reconsideration or Review was denied by the Industrial Commission. PRC thereupon filed this action for review. We remand for additional findings of fact.

Fred C. Mabbutt was found dead on October 23, 1981, at the end of his eight-hour shift as a belt attendant in PRC's underground coal mine in Helper, Utah. Mabbutt's job consisted of keeping certain underground conveyor belts working, and of keeping the belt rollers and the area surrounding these belts free of coal dust and other materials which fall from the belts or collect around them in the normal course of their operation.

According to both appellants and respondents, the crux of this case is the question of whether there is substantial evidence to support the decision of the administrative law judge that Fred Mabbutt's heart attack and subsequent death satisfies the requirement of section 35-1-45 that the death be "by accident arising out of or in the course of his employment." However, both sides disagree about the appropriate legal standard to be applied in evaluating the evidence. Therefore,

we have two questions on appeal. The first is what constitutes a compensable "accident." The second question is whether the evidence of Mr. Mabbutt's activities on the day of his death satisfies the element of causation such that the accident, if one did occur, was in fact related to his employment.

There is no need to dwell at length on the question of the appropriate legal standard. This issue has just been dealt with extensively in Allen v. Industrial Commission, No. 20026 (Utah November 14, 1986). There we attempted to settle the meaning of the term "by accident," which had become confused by varying and inconsistent statements from this Court over a long period of time. The Allen definition is as follows: "where either the cause of the injury or the result of an exertion was different from what would normally be expected to occur, the occurrence was unplanned, unforeseen, unintended and therefore 'by accident'." Id., slip op. at 9 (emphasis in original); see id., slip op. at 10. This definition follows the standard articulated in Carling v. Industrial Commission, 16 Utah 2d 260, 399 P.2d 202 (1965), and in earlier decisions of this Court that can be traced back to 1922, including most notably Purity Biscuit Co. v. Industrial Commission, 115 Utah 1, 201 P.2d 961 (1949). This standard has been followed most recently in Schmidt v. Industrial Commission, 617 P.2d 693, 695 (Utah 1980), and Kaiser Steel Corp. v. Monfredi, 631 P.2d 888, 890-91 (Utah 1981).

Under the Allen standard, it is fairly easy to determine that Mr. Mabbutt did die "by accident" on October 23, 1981. His heart attack was certainly an "unexpected or unintended" event that resulted in his death. Allen v. Industrial Commission, slip op. at 10. However, the finding that the death was "by accident" does not complete the analysis of whether the resulting injury is compensable. Under Allen, the more difficult question involves the determination of whether the injury had the requisite connection with the employment duties--whether it arose "out of or in the course of . . . employment." U.C.A., 1953, § 35-1-45 (1974 ed., Supp. 1986); see Allen v. Industrial Commission, slip op. at 10.

Prior to Allen, the obvious need for a test to assure that there was a causal connection between the injury and the employment duties of the injured party was sometimes dealt with in our cases by requiring that the occurrence resulting in the injury be shown to have involved "unusual exertion." Allen v. Industrial Commission, slip op. at 11-13. This is the standard apparently applied by the Commission in this case and found to have been met.

However, Allen discarded the usual/unusual exertion distinction as a means for determining whether the injury was the result of an "accident." Instead, the Court dealt with the

causation requirement in more candid terms that focus frankly on the questions of legal and medical causation. It delineated the analysis as follows:

> Under the legal test, the law must define what kind of exertion satisfies the test of "arising out of the employment" . . . [then] the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this [injury].

Id., slip op. at 13-14, citing Larson, Workman's Compensation § 38.83(a) at 7-276 to -277 (1986).

In applying the Allen analysis to the present case, then, the first question is whether legal cause has been shown. Under Allen, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." Allen v. Industrial Commission, slip op. at 16. In appraising whether the employee's exertion would be usual or ordinary in nonemployment life, an objective standard is to be applied that is based on the nonemployment life of the average person, not the nonemployment life of a particular worker. Id. The requirement of "unusual or extraordinary exertion" is designed to screen out those injuries that result from a personal condition which the worker brings to the job, rather than from exertions required of the employee in the workplace. Id., slip op. at 14.[1]

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1. As a practical matter, when the Allen standard is being applied to cases which may involve preexisting conditions, before evidence is taken on the issue of legal cause, the Commission would be well-advised to first make a determination of whether or not the preexisting condition does in fact exist. If a preexisting condition exists, then the parties and the hearing officer will know that the "extraordinary exertion" test will be applied to the facts as they are developed, and the evidence can be appropriately prepared and marshalled for presentation to the fact finder. If a preexisting condition does not exist, the hearing may be expedited because there will be no need to show how hard the employee was or was not working, only that the employment activity led to the injury. Of course, even if a preexisting condition is involved, if the Commission finds that legal cause does exist, then it is still appropriate to refer the matter to a medical panel to determine whether the facts, as determined at the legal cause hearing, are sufficient to establish medical causation.

In the present case, Mabbutt was suffering from a preexisting condition which contributed greatly to his heart attack. The evidence is uncontroverted that he had hypertensive cardiovascular disease, atherosclerotic cardiovascular disease, and possibly diabetic cardiomyopathy. His hypertension was exacerbated by his obesity and possibly a high salt diet. He was a diabetic and had gout. The doctor on the medical panel, to which this case was referred by the administrative law judge, concluded that there was no evidence that Mabbutt's work "had any relationship to [his] development of coronary artery disease."

Since Mabbutt brought heart disease to the workplace, before legal causation can be established, the Commission must find that his employment activities involved exertion or stress in excess of the normally expected level of nonemployment activity for men and women in the latter half of the twentieth century. If such a finding is made, then the requirement of legal cause is satisfied because it is presumed that the employment increased the risk of injury to which that worker was otherwise subject in his nonemployment life. At that point the inquiry shifts to medical cause, i.e., whether the injured party's work-related activities were, in fact, causally linked to the injury. Id., slip op. at 17.

The question of whether the employment activities of a given employee are sufficient to satisfy the legal standard of unusual or extraordinary effort involves two steps. First, the agency must determine as a matter of fact exactly what were the employment-related activities of the injured employee. Second, the agency must decide whether those activities amounted to unusual or extraordinary exertion. This second determination is a mixed question of law and fact.

Because the whole legal cause determination hinges upon the agency's findings as to what the injured worker's job-related activities were, our review of the Commission's decision must begin with those findings. In the present case, we are unable to affirm the Commission's ruling because of the inadequacy of these findings. In his job, Mabbutt worked alone in the mine, and he encountered only one person while working on the day of his death. For that reason, it was necessary to infer what Mabbutt's activities were from the conflicting evidence adduced at the hearing before the administrative law judge. The company brought in an expert to describe his understanding of the exertion required to perform that particular job. His testimony would support a conclusion that no unusual or extraordinary effort was required. On the other hand, Mabbutt's widow introduced testimony from a fellow worker who described how she had seen Mabbutt perform the work, testimony that might support a conclusion that the effort required was unusual. This testimony was disputed by the company.

Unfortunately, the administrative law judge's findings do not resolve the conflicts in the testimony and do not indicate that he made a finding as to exactly what Mabbutt's activities were on the day of his death. Absent such findings, it is impossible for us to take the next step and determine whether Mabbutt's work-related activities, as found by the Commission, rose to the level necessary to satisfy the "unusual or extraordinary" exertion threshold established by Allen for injured employees with preexisting problems.

The administrative law judge found that "Mabbutt died as the result of an accident in the course of his employment . . . resulting from unusual exertion and stress connected with his employment." (Emphasis added.) It may be argued that this is a sufficient finding of legal cause to warrant our affirming the Commission on this point. However, the "finding" of unusual exertion and stress is nothing more than a conclusion. It is not supported by anything that could be construed as a finding as to precisely what Mabbutt was doing on the day of his death. We cannot affirm such a mixed conclusion of fact and law when its necessary premises are not evident.

There is an added problem here. The Commission decided this case under pre-Allen law. We cannot determine whether the administrative law judge used the words "unusual exertion" in the same sense as they have been defined by Allen. A talismanic incantation of "unusual or extraordinary exertion" is not a substitute for careful analysis by the Commission of whether the actual job-related activities in question exceed the normally expected level of activity for men and women in the latter half of the twentieth century.[2] In the present case, we are uncertain of the standard applied by the Commission and cannot tell how the stated conclusion was reached. For that reason, we must reverse and remand the matter to the Commission so that proper findings of fact can be entered and the Allen standard can be applied to them to determine legal cause.

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2. We reject, categorically, the suggestion advanced by the company that because the belt-attendant job is sometimes performed by women, it must necessarily involve less than extraordinary effort or strain. We take judicial notice of the fact that women, as a group, tend to be smaller in size and have less physical strength than do men, as a group. However, with respect to size and strength, individual men and women are arrayed over a continuum from one extreme to the other. No generalization can be made that because a woman performs a certain job it necessarily involves strength and exertion requirements at the lower end of the spectrum, and the contrary is, of course, true of a job performed by a man. Each job's demands must be evaluated on their own; they cannot be categorized as requiring "usual" or "unusual" exertion simply because they are normally done by women or men, respectively.

A word about the issue of medical cause. As noted, the administrative law judge did not resolve conflicts in the testimony about Mabbutt's work activities. However, he did adopt the findings of the medical panel, which contained a doctor's assumptions about what Mabbutt was actually doing on the day in question, and which then relied on those factual assumptions in finding a causal link between the work and his death. The factual recitation in the panel report was derived from the conflicting evidence presented at the hearing and inferences drawn from that evidence. In a number of respects, as the company demonstrated at the hearing on its objections to the medical panel report and in its brief on appeal, the panel was confused as to some of the basic duties of Mabbutt's job and made assumptions about his actual activities which are unsupported by the evidence.

It is not the role of the medical panel to resolve conflicts in the factual evidence regarding the injured party's activities. Section 35-1-85 of the Code places that responsibility solely on the Commission. U.C.A., 1953, § 35-1-85 (1974 ed.). Under Allen, as before, the medical panel is only to take the facts as found by the administrative law judge and consider them in light of its medical expertise to assist the administrative law judge in deciding whether medical cause has been proven. The medical panel strays beyond its province when it attempts to resolve factual disputes, and the administrative law judge improperly abdicates his function if he permits the panel to so act. IGA Food Fair v. Martin, 584 P.2d 828, 830 (Utah 1978).

We acknowledge that during the adjudication of this matter, the Commission was laboring under the confusing and conflicting state of the law as it had developed prior to Allen. The issues presented by this and similar cases should be easier to resolve in the future. However, questions of some subtly will remain in cases involving claims for internal failure where the worker has a preexisting condition that contributes to the injury and where a determination must be made as to whether a specific work activity amounts to "unusual or extraordinary" exertion. The concept of "unusual or extraordinary" exertion remains to be fleshed out over time. Of necessity, the process of pouring specific content into that concept will rely heavily upon the Commission's expertise in and familiarity with the work environment.

This case is remanded to the Industrial Commission for findings of fact as to what Mabbutt's activities actually were on the day of his death. Based upon those findings, and upon a review of Allen, the Commission may then adhere to or abandon its conclusion that those activities amounted to extraordinary exertion. Because the determination of medical cause must be

based upon the Commission's findings as to the actual activities of the worker, and because the panel's report in the present case rested upon the medical panel's improper assumptions as to the facts, the Commission should resubmit the question of medical causation to the panel after it has made the appropriate factual findings.

WE CONCUR:

Richard C. Howe, Justice

Christine M. Durham, Justice

STEWART, Justice: (Dissenting)

I dissent. In one of the first important tests of the rules laid down in Allen v. Industrial Commission, 46 Utah Adv. Rep. (November 14, 1986), the majority reverses and remands to "resubmit the question of medical causations to the panel." But the medical panel has already addressed that exact question, and the administrative law judge found that the decedent's death was caused by his job-related activities on the day that the fatal accident occurred. What more the court expects than has been done by the Commission is not explained by the majority. In my view, the administrative law judge was correct in his ruling, the Commission so found, and I agree.

It is precisely this kind of case that demonstrates that our newly formulated methods of analysis will inevitably draw the Commission off into pathways that are bound, I believe, to lead to error. The Court's unfortunate requirement that, since Mabbutt had a preexisting condition, the Commission must find "that his employment activities involved exertion or stress in excess of the normally expected level of activity for men and women in the latter of the twentieth century," is precisely the discriminatory application of worker's compensation laws to workers with a preexisting condition, which I referred to in my dissent in Allen.

I would affirm on the authority of Pittsburg Testing Laboratory v. Keller, 657 P.2d 1367 (Utah 1983) and Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (Utah 1981). Like Pittsburg Testing and Monfredi, the decedent's preexisting coronary condition was clearly aggravated in this case. The administrative law judge made that clear in his findings:

> [T]here is no way of knowing exactly how long before the hour of 4:20 p.m. the applicant first felt the effects of that stress or at what time he actually died but it could have been some hours before 4:20 p.m. We are not called upon to speculate as to those times or as to the excessive stress or exertion later in the afternoon in view of the fact that two fine cardiologists have agreed that the evidence is sufficient to convince them that the death was industrially related.
>
> The Administrative Law Judge finds that Mr. Mabbutt died as the result of an accident in the course of his employment on October 23, 1981 resulting from unusual exertion and stress connected with his employment on that fateful afternoon.

I would affirm. The Commission has found the necessary facts and it is not for us to ignore them.

Hall, Chief Justice, concurs in the dissenting opinion of Justice Stewart.

THE INDUSTRIAL COMMISSION OF UTAH

DOCKETED

Case No. 82001604

2-26-88 RG
DATE JME JMB INT

MARIE T. MABBATT, widow of FRED C. MABBUTT, deceased,	*	
Applicant,	*	ORDER UPON
vs.	*	REMAND
PRICE RIVER COAL CO. and/or CIGNA INSURANCE and SECOND INJURY FUND	*	
Defendants.	*	

FURTHER EVIDENTIARY HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on July 7, 1987, at 10:00 a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge

APPEARANCES: The applicant was present and represented by Virginius Dabney, Attorney at Law.

The defendants were represented by James Elegante and Hal Pos , Attorneys at Law.

The Second Injury Fund was represented by Erie V. Boorman, Administrator.

SECOND HEARING ON OBJECTIONS TO MEDICAL PANEL REPORT: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on February 17, 1988, at 8:30 a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Virginius Dabney, Attorney at Law.

The defendants were represented by James Elegante, Attorney at Law.

The Second Injury Fund was represented by Erie V. Boorman, Administrator.

This case involves the death Fred C. Mabbutt on October 23, 1981. The Commission, previously entered an Order awarding Mr. Mabbutt's widow death benefits in this case. The employer, by and through counsel, filed an appeal with the Utah Supreme Court. In an opinion filed December 31, 1986, a majority of the Court found that the case should be "remanded to the Industrial Commission for findings of fact as to what Mabbutt's activities actually were on the date of his death." The Court also instructed that "the Commission should resubmit the question of medical causation to the panel after it has made the appropriate factual findings."

The Administrative Law Judge made his findings on or about July 8, 1987, and referred the same to the medical panel for its further evaluation. The medical panel filed its supplemental report on September 1, 1987. Unfortunately, that report contained a typographical error in the following passage: "I still feel that the patient's work activities were an inmaterial (sic) contributing factor to his death from coronary artery disease." Thereafter, the applicant by and through counsel, filed a request for clarification of the supplemental panel report with the Commission. Shortly thereafter, the employer, by and through counsel, indicated that the error was clearly a typographical error, and that the defendants could not understand why the file was being referred on for further clarification. Apparently, the employer did not fully review the report of Dr. Perry, since the very next sentence stated: "If he did not have coronary artery disease, the stress and work of that occasion would not have percipitated (sic) his demise." Since this sentence is inconsistent with the sentence containing the error, vigilance would have required the employer to ask for a clarification also. The employer did not see fit to do so, but rather after the clarification was received from Dr. Perry indicating that the sentence should have read: I still feel that the patient's work activities were a material contributing factor to his death from coronary artery disease." Upon receipt of that report, then the employer filed an objection to the medical panel report contending that the clarification had completely altered the meaning of the original report. However, a close review of the file, including the medical panel's original report will indicate that for the panel to have made the finding contended by the employer, would have required a 360 degree turnabout on the part of the medical panel. If such were the case, again vigilance would have required that the employer seek a clarification of this astounding turnabout by the doctor, if such was the case. Therefore, in a technical sense, the applicant's motion to have the defendant's objections to the medical panel report stricken in a technical sense should be granted. However, recognizing that the Commission is not bound by any stricken rules of evidence or procedure, I have denied the motion so that a full record might be made in this case.

The tenor of the employer's objection to the medical panel report is first that the applicant's work activities of October 23, 1981, were not the

necessary precipitating factor resulting in his death. However, it would appear to the Administrative Law Judge that the defendants have missed the point of the Workers Compensation Act. The Act does not require that the death of an individual be the result of a necessary precipitating factor, rather the Workers Compensation Act would appear to only require that the work activity were a sufficient precipitating factor resulting in the death of the employee. When the issue is framed as such, it seems clear to the Administrative Law Judge that there really is no disputed medical issue in this case. A close and careful review of the medical report of the employer's medical expert, Dr. Fowles, dated November 25, 1987, indicates as much. Dr. Fowles indicates "I agree with Dr. Perry that individuals without coronary disease usually do not die from physical exertion or emotional stress." Further down in the report the doctor indicates "I repeat my statement rendered in the hearing of October 24, 1984, that on the whole, extreme physical exertion and emotional stress can accompany sudden cardiac death and are sufficient but are not necessary." In Dr. Fowles testimony, he was asked if the activities of Mr. Mabbutt of October 23, 1981, were sufficient precipitating events, to which he answered they were. He also went on to indicate that he agreed with Dr. Perry and Dr. Yanowitz that the applicant's activities of October 23, 1981, contributed something substantial to increase the applicant's risk he already faced of having a heart attack. Again, the only difference of opinion, if there is one, is Dr. Fowles' belief that "the events on the date of his death were not necessary for sudden cardiac death." However, as I have indicated, I find that our law does not require that the work activities be necessary to cause a heart attack, only that they be a sufficient cause of the applicant's problem. For the above stated reasons, I find that the objections to the supplemental medical panel report of the employer should be, and the same are hereby denied. Accordingly, the medical panel report is admitted into evidence.

SUPPLEMENTAL FINDINGS OF FACT:

Fred C. Mabbutt was employed by Price River Coal as a belt attendant. This job consisted of keeping the conveyor belts working and clean, and also required the rock dusting of the area at the end of each shift. On October 23, 1981, Mr. Mabbutt arose from bed as usual, and after shaving bade his wife goodbye. At approximately 7:00 a.m., he picked up c co-worker, who testified that Mr. Mabbutt seemed fine and was not complaining about his health or about chest pains. Mr. Mabbutt then reported for work at 8:00 a.m., and thereupon discovered that the flyte pump or sump pump was clogged. As a result, the normal holding area known as the block dam, was accumulating coal fines (fine coal particles) in a pile. The deceased was attempting to unplug this clog in the pump by using a one inch high pressure hose in an effort to flush out the blockage.

At 11:15 a.m., the belt inspector, Gene Miller, approached Mr. Mabbutt and observed that he was attempting to unplug the pump blockage with the high pressure hose, and that the pump was off. Since it was close to lunch time, Mr. Miller suggested to the deceased that he relax and take it easy, since the line was already plugged. Mr. Mabbutt was clearly agitated, and was cursing and attempting to fix the pump. At one point, he became so frustrated with his in ability to disassemble a clamp, that he threw his gloves down onto the ground. Mr. Miller also observed that Mabbutt had a pale face and hands. Mr. Mabbutt was also trying to lift the 110 pound pump out of the sump by tugging and pulling on the hose, but with no success. Although Miller suggested to Mabbutt that he eat his lunch, on three separate occasions, Mabbutt did not do so but rather continued working in the agitated and charged state. The deceased had advised Mr. Miller that the pump line had been plugged since the beginning of his shift that morning. Mr. Miller, when he approached Mr. Mabbutt, observed that the coal fines and muck had spilled over the block dam, and had cause a puddle in the area 10 feet by 20 feet, two inches deep in the most shallow point, and approximately two feet deep at the deepest point. While Miller was attempting to coax the deceased into eating his lunch, he observed that Mr. Mabbutt had made four trips from the sump area to the #4 belt. Each bucket of muck weighed at least 65 pounds, and it was Mr. Mabbutt's practice to carry two buckets at a time, so as to even out the weight and ease his ambulation. The distance from the sump to the #4 exchange belt was approximately 60-70 feet, up a 7% grade or incline. Miller estimated that to clean the area where Mr. Mabbutt was working would have required the removal of 100 buckets of muck. Mr. Miller stayed with the deceased until approximately noon, and at that time moved on to another belt for inspection. However, Mr. Mabbutt did not eat his lunch with Mr. Miller or while Mr. Miller was present.

The deceased continued to work in this matter, and the last known contact with him was a 1:15 p.m. At that time, there was a stoppage of the belts in the mine, since the problem with one causes the interlock mechanism to terminate all belt operations. At 1:15 p.m., Miller called Mabbutt and inquired if there was a problem with his belt. Mabbutt advised Miller that the problem was not with his belt. Before the belt was shut down at 1:15, it had been running all morning while Mr. Mabbutt was attempting to solve the problem with the sump pump. As a result, the accumulations from the belt were also mounting, since Mr. Mabbutt was not shoveling coal fines from beneath the rollers or in the vicinity of the drive unit.

The deceased continued shoveling and carrying buckets of muck to the #4 belt, and continually was engaged in these activities until his unfortunate demise. At approximately 4:20 p.m., the belt attendant assigned to the next shift following Mabbutt's reported to the belt. Upon arriving, she noticed that the area had not been rock dusted and that the surface of the belt was partially clean. Further investigation lead her to the discovery of Mr.

Mabbutt's body, which had a hose in the left hand, which was still running, and a shovel near by which was used to shovel muck onto the belt. Also near by was a muck bucket, which was still wet, although it had been emptied.

The Administrative Law Judge finds that the deceased's activities of October 23, 1983, amounted to unusual exertion. What we have is a coal miner who was confronted with a plugged sump pump, which was causing coal fines and muck to spill over the block dam resulting in a large puddle. The belt line is a secondary escape way true enough from the mine, but testimony clearly indicated that in the event of a fire or other tragedy in the mine which would prevent a miner from seeing his way clear to make an escape, the belt line offers the only other sure method of escape, because a miner can feel his or her way out of the mine by following the belt line. Thus it is reasonable to conclude that Mr. Mabbutt felt he was under some pressure to keep that area of the mine clean in the event an accident should occur. In addition, Mr. Mabbutt was under the pressure of being behind in his work, and being frustrated by an inoperative piece of machinery. There was a possibility of an MSHA citation being issued if the pile were too big, which only helped add urgency to Mabbutt's efforts.

Based on the uncontradicted testimony of Mr. Miller, I conclude that Fred Mabbutt moved the estimated 100 buckets of muck to clean out his area of the belt, or some amount close to that. It is true that some doubt exists as to the exact activities of Mr. Mabbutt on October 23, 1981, but viewing the uncontradicted portions of the evidence, and the evidence itself as a whole, and giving the benefit of the doubt to the applicant, I conclude that Mr. Mabbutt did move all of the muck that had accumulated in the sump portion, or at least a major portion of it. I find that his work activities on October 23, 1981, involved usual exertion, especially in light of the problem he was having with the pump which had caused such a hugh accumulation of muck in he area. When Mr. Mabbutt was seen by Mr. Miller he was clearly stressed and pale from his extraordinary efforts that morning. It can hardly be said that carrying 130 pounds of muck up a steep 7% slope for 70 feet approximately 50 times is something he would have done as an activity of every day life. It is clear to the Administrative Law Judge that the carrying of all these muck buckets was extraordinary exertion under any definition of that term. Further, his efforts at freeing the 110 pound sump pump were also extraordinary exertions under any definition of the term. Accordingly, pursuant to the Allen decision, I find that the work activities of Fred C. Mabbutt on October 23, 1981, ". . .contributed something substantial to increase the risk he already faced in every day life because of his condition." Allen v. Industrial Commission 729 P2d 15 (Utah 1986) at 25. Therefore, although the applicant may have had pre-existing coronary disease, his work activities of October 23, 1981, were clearly extraordinary exertion, and therefore the legal causation requirement of Allen has been met. The applicant must also prove medical causation, in that he must show that the "stress, strain or exertion required by his or her occupation lead to the

resulting injury or disability." Allen at 27. In this case, the medical panel found that the applicant's work activities of October 23, 1981, resulted in the resulting death he sustained as the result of a heart attack on October 23, 1981. This finding was also bolstered by an additional medical expert that testified on behalf of the applicant, and is also supported by the findings of Dr. Fowles, the defendants medical expert. Put differently, all three cardiologists who have submitted reports in this matter conclude that the applicant's work activities of October 23, 1981, were a sufficient precipitating factor resulting in his death by heart attack.

The employer has also urged that there be an apportionment of liability for the death benefits in this case as between it and the Second Injury Fund. A review of the file indicates that this issue was first raised by the employer in its letter motion for review on October 19, 1987. The Administrator of the Second Injury Fund filed a response indicating that the belated efforts of the employer to raise the apportionment issue at this late date should be dismissed. The Second Injury Fund points out that the employer has waived the apportionment of Second Injury Fund liability through their inaction. The Administrator points out that this case went through the entire death benefit application procedure including an evidentiary hearing, medical panel referral and report, hearing on objections to the medical panel report, issuance of Findings of Fact, Conclusions of Law and Order, motion for review, denial of motion for review, petition for Supreme Court review, Supreme Court briefs and oral argument, and a decision from the Utah Supreme Court, which provided that the case be remanded to the Commission for the purpose of determining what Mr. Mabbutt's actual activities were on October 23, 1981. Nowhere in any of those proceedings did the employer see fit to raise the apportionment of liability for death benefits as between itself and the Second Injury Fund. In fact, the issue was not raised at the second evidentiary hearing or the second medical panel referral or after the receipt of the first report. Now, at this late date, the employer seeks to involve apportionment of the death benefits as between itself and the Second Injury Fund. The Second Injury Fund cites the case of Pease v. Industrial Commission 694, P2d 613 (Utah 1984) for the proposition that where a party files a motion for review, they have an obligation to raise all issues that can be presented at that time and that those issues which are not raised are waived. In the instant case, the employer did not raise the apportionment issue when it first filed its motion for review, and it also failed to mention that issue in its brief to the Utah Supreme Court in its oral argument or even at the second evidentiary hearing before the Administrative Law Judge. It is therefore my finding that under the rational of the Pease decision, that the defendant, Price River Coal, has waived the apportionment of death benefits in this case.

In passing, I might note that even if the right to apportionment of the death benefits in this case were not waived by the employer, I see no basis upon the record to grant the relief they seek. There is no apportioning of liability by the defendant's own expert, Dr. Fowles, does not set forth any

basis upon which apportionment might be made. On cross-examination, the medical panel chairman could not quanify what portion of the substantial material contributing factor would have been due to the applicant's pre-existing coronary disease, and what might have been due to the unusual exertion he performed on October 23, 1981. Dr. Yanowitz also was unable to quanify the relationship in this case. In addition, the Second Injury Fund has argued that there is no statutory provision allowing for the apportionment of death benefits in workers compensation cases. By comparison, the employer argues that there is nothing in the Workers Compensation Act to suggest that death benefits cannot be apportioned. The arguments of counsel are both correct, however, the Administrative Law Judge finds that in the absence of a specific statutory provision allowing for the apportionment of death benefits, the Administrative Law Judge will not create a right, which has heretofore not been allowed by either the Legislature or the Utah Supreme Court. Accordingly, the request of the defendants for apportionment of death benefits in this case is hereby denied.

As indicated previously, I have found that Fred C. Mabbutt sustained a compensable industrial accident on October 23, 1981, while employed by Price River Coal as a belt attendant. On that date, Mr. Mabbutt was earning wages sufficient to entitle him to the maximum award for death benefits in the amount of $255.00 per week for 312 weeks for a total of $79,560.00. In reviewing the file, it appears that these benefits awarded herein will terminate effective October 16, 1987. Thereafter, the applicant may be entitled to continuing benefits from Price River Coal/CIGNA Insurance upon the completion and submission of a Declaration of Dependency form which will be sent to her by the Industrial Commission. Mrs. Mabbutt should return that form for further processing by the Administrative Law Judge. In the event the Declaration of Dependency form indicates that the applicant is still dependent upon the benefits of the employer for her continued support, then CIGNA will be entitled to an offset of 50% of the applicant's social security death benefits she is currently receiving.

CONCLUSIONS OF LAW:

Fred C. Mabbutt sustained a compensable industrial accident on October 23, 1981, while employed by Price River Coal Company.

ORDER:

IT IS THEREFORE ORDERED that Price River Coal and/or Cigna Insurance pay Marie T. Mabbutt compensation at the rate of $255.00 per week for 312 weeks for a total of $79,560.00, as compensation for the death of her husband, Fred C. Mabbutt. These benefits shall commence effective October 24, 1981,

and are due and owing in a lump sum. These benefits shall also include interest of 8% per annum commencing effective November 14, 1981, with interest continuing until payment is made.

IT IS FURTHER ORDERED that Cigna pay Virginius Dabney, attorney for the applicant, the sum of $14,184.00 for services rendered in this matter, the same to be deducted from the aforesaid award of the applicant and remitted directly to his office.

IT IS FURTHER ORDERED that the issue of Mrs. Mabbutt's continued dependency is hereby reserved pending receipt of a Declaration of Dependency form from her, which will entitle her to benefits after October 16, 1987, if so found by the Commission.

IT IS FURTHER ORDERED that the Second Injury Fund is hereby dismissed as a party defendant in this matter.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 24th day of February, 1988.

ATTEST:

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on February 24, 1988 a copy of the attached ORDER in the case of Fred C. Mabbutt issued February 24 was mailed to the following persons at the following addresses, postage paid:

Marie T. Mabbutt
260 West 500 South
Price, Utah 84501

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James Elegante
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Erie V. Boorman, Administrator, Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By _____
Sherry

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 82001604

MARIE T. MABBUTT, widow of FRED D. MABBUTT, deceased, Applicant, vs. PRICE RIVER COAL COMPANY and/or CIGNA INSURANCE and SECOND INJURY FUND, Defendants.	ORDER DENYING MOTION FOR REVIEW AND PARTIALLY GRANTING CROSS MOTION FOR REVIEW

On December 31, 1986, the Utah Supreme Court issued its decision in the above-captioned matter, remanding the case to the Industrial Commission to more clearly delineate the facts upon which the Administrative Law Judge based his finding that legal causation was established. The case involves the death of a coal miner who was found dead at the job site and was determined to have died due to a heart attack. The deceased was suffering from several pre-existing conditions which made him very susceptible to sudden death by heart attack. Due to the pre-existing conditions, in order for the death to be compensable, it is necessary to establish that the deceased died as result of unusual exertion on the job in order to meet the legal causation test. On remand, the Administrative Law Judge held an additional hearing to take testimony and the Administrative Law Judge thereafter submitted a Summary of Testimony to the medical panel for review. The medical panel report and later clarification of that report resulted in Objections to the Medical Panel Report being filed by counsel for the defendant on October 19, 1987. On February 17, 1988, a hearing on Objections to the Medical Panel Report was held. Based on that hearing, the Administrative Law Judge determined both medical and legal cause were established and thus he issued an Order awarding benefits to the widow on February 24, 1988.

On March 7, 1988, counsel for the defendant filed a Motion for Review objecting to the Administrative Law Judge's finding that both legal and medical causation had been established. Counsel for the defendant states that the medical experts as a whole had concluded it was <u>not</u> necessary that the deceased was performing exertive work in order for his heart attack to have occurred. Because there was no direct evidence as to the nature of the deceased's activities just prior to the heart attack, counsel for the defendant concludes there is insufficient evidence on which to base the finding that the work activities were unusually exertive (legal causation) and the work activities caused the heart attack (medical causation). Counsel for

the defendant states that the Administrative Law Judge's findings of legal and medical cause were based on unreasonable factual inferences and speculation.

On March 10, 1988, counsel for the applicant filed a Cross Motion for Review arguing that the Administrative Law Judge should have awarded attorney's fees in addition to benefits awarded as opposed to out of the award and that the fees should have been calculated based on a percentage of more than just the first six years of benefits plus any interest awarded. Counsel for the applicant based this Motion in part on another Administrative Law Judge's decision to award fees in addition to the benefits in the Commission case Harrison vs Olympic Oil, Inc., case No. 86000733 (January 7, 1988). On March 25, 1988, counsel for the defendant filed a Response to the applicant's Cross Motion for Review arguing that the applicant's counsel's request for fees in addition to the award instead of out of the award was against both case law and statute as well as the Commission's own Rule on attorney's fees. Counsel for the defendant cites the Utah Supreme Court case Graham vs the Industrial Commission, 495 P.2d 806 (Utah 1972) as authority for the proposition that the Commission does not have authority to award fees in addition to the benefits as a cost against the defending party. Counsel for the defendant further argues that the discretion allowed the Administrative Law Judge by the Commission Rule R490-1-4 (b), to vary from the Rule in awarding fees to avoid an unconscionable result, does not include discretion to award the fees as a cost but merely allows discretion as to the amount of the fee to be deducted from the applicant's award. Finally, counsel for the defendant states there is nothing "unconscionable" about requiring an applicant to pay his own attorney as this is the normal Rule.

The Commission finds that the two issues on review are:

1. Whether the Administrative Law Judge's findings of legal and medical cause are supported by the facts, and

2. Whether the attorney's fees should be awarded in addition to the widow's benefits and in an amount greater than that specified by the Administrative Law Judge.

The Commission finds that the Administrative Law Judge's reliance on the testimony of the employees who worked with the deceased and/or were aware of the deceased's duties is sufficient basis for a finding that the deceased was exerting himself unusually on the date of his attack. The Commission finds that it is not absolutely necessary to have eye witness testimony as to the activities of the deceased 40 minutes prior to his death in order for the Administrative Law Judge to conclude that legal causation is established. Furthermore, the Commission finds that the medical evidence regarding causation does not have to be stated in terms of absolute proof. In this

case, the Commission finds the terms used by the doctors meets the "reasonable medical probability" standard adopted by the Industrial Commission and thus there is sufficient medical evidence to support the Administrative Law Judge's conclusions. Therefore, with respect to the first issue, the Commission must deny the defendant's Motion for Review and affirm the Administrative Law Judge.

With respect to the second issue, the Commission finds the Administrative Law Judge correctly calculated the fee to be paid the applicant's counsel. However, as result of there being no final resolution of the attorney fees issue first raised in the Harrison case (cited above), the Commission will reserve decision on the payment of attorney fees in addition to the award until a final resolution of the attorney fees question in the Harrison case has occurred.

ORDER:

IT IS THEREFORE ORDERED that the defendant's Motion for Review is denied, and the the applicant's Cross Motion for Review is partially denied with the issue of attorney fees payable in addition to the award reserved until a final decision is rendered in the case Harrison v. Olympic Oil, Inc. and/or Workers Compensation Fund of Utah, case No. 86000733. Except as to the issue of attorney fees, the Administrative Law Judge's February 24, 1988 Order is affirmed in all respects.

Stephen M. Hadley
Chairman

John Florez
Commissioner

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 23rd day of May, 1988.
ATTEST:

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on May 23rd, 1988, a copy of the attached ORDER DENYING AND PARTIALLY GRANTING APPLICANT'S CROSS MOTION FOR REVIEW in the case of MARIE T. MABBUTT, WIDOW OF FRED C. MABBUTT was mailed to the following persons at the following addresses, postage paid:

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Erie V. Boorman, Administrator, Second Injury Fund

Timothy C. Allen, Administrative Law Judge

Richard G. Sumsion, Administrative Law Judge

Janet L. Moffitt, Administrative Law Judge

INDUSTRIAL COMMISSION OF UTAH

By Pamela Hayes
Pamela Hayes